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In the

Supreme Court of the United States

OCTOBER TERM, 1954

R. E. SHUTT,
Petitioner and Appellant Below,

v.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WM. ANDRESS, JR.,
301 Blue Cross Building,
2208 Main Street,
Dallas, Texas,
Counsel for Petitioner.

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

1.

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Northern District of Texas is not reported in Federal

Supplement but is found in the record at page 110. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in *218 Federal Reporter, Second Series, page 10*, and is appended hereto.

2.

JURISDICTION

This Court has and should exercise its jurisdiction under §1254 of Title 28 of the United States Code and Rule 19 of the Rules of this Court, to review the judgment herein because the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court in that it has permitted recovery of alleged overcharges by a motor carrier without a showing of injury to the government, or unreasonableness of rates, or any excess over available rates for the same service rendered by others. The judgment sought to be reviewed was dated and entered on 7 January 1955, and a petition for rehearing was denied by an order dated 18 February 1955.

3.

QUESTIONS FOR REVIEW

The basic question presented for review is best stated thus:

Can the United States Government, in order to meet a war time emergency, create a unique expedited specialized carrier service whose rates are subsequently in due course

approved by the Interstate Commerce Commission, and years later recover the excess in such ratified rates over the rates of common carriers which were not at the time of the emergency equipped to furnish such expedited and specialized services?

In order to meet a dire necessity for rebuilt airplane motors needed in pilot training during the Fall of 1943, Shutt undertook immediate special delivery thereof, by means of special vehicles designed for extraordinary loads, which was a non-competitive service not being furnished by others as found by the Interstate Commerce Commission subsequently, and the rates charged to the government and subsequently ratified by the Interstate Commerce Commission were higher than those charged by common carriers for routine delivery of small quantities of similar equipment, not meeting the emergency needs. Nine years later the government sued for and recovered the amount by which these special delivery rates subsequently ratified by the Interstate Commerce Commission exceeded non-comparable published rates of common carriers for dissimilar services. No similar or competitive service was shown to have been available to the government from any other carrier at the time of the emergency during the war and the Interstate Commerce Commission had affirmatively found that none existed. No application had ever been made to the Interstate Commerce Commission for refund or to show that the rates subsequently ratified were not reasonable, a prerequisite to litigation.

4.

STATUTES APPLICABLE

The applicable statutes are the following:

49 United States Code § 66: "Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the general accounting office, but the right is reserved to the United States government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." *54 Stat. 955.*

49 United States Code §16, ¶(3), subdivision (g): "The term 'overcharges' as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission."

5.

FACTS OF THE CASE

The facts material to consideration of the foregoing question are these, with appropriate record references:

R. E. Shutt, one of the stockholders of Oil Field Service, Inc., bought out the other stockholders and became its sole owner, and made application to various regulatory bodies for transfer of his permit as a specialized carrier of heavy equipment, including motors, from the corporation to himself as R. E. Shutt Motor Lines. During the period involved he operated under some permits as R. E. Shutt

Motor Lines, and under some others as Oil Field Service, Inc., all of his operations being from the same headquarters, and all of his trucks having both names on them. (R. 86-88, 109-10.) Tariffs bearing both names at rates actually charged the government were on file, based upon actual speedometer mileage, for oil field, contractors' and other heavy equipment, including motors, but not specifically airplane motors. (R. 63-4, 82-3.)

Involved herein are 33 shipments of rebuilt airplane engines and components from the repair depot at Love Field in Dallas to various pilot training fields in the Southwest area. (R. 55.) These shipments were made upon an emergency rush basis. Shutt could spot a truck at the depot in the time it took to drive nine miles, and by supplying two drivers could keep the truck rolling around the clock, making deliveries as far as 500 miles away within a 24-hour day. The airplane engines were of such a size that they could not be placed two abreast in an ordinary truck or trailer such as used by common carriers, but Shutt operated specialized equipment designed to carry overweight, overwidth, oversized, and overheight heavy machinery, and with this specialized equipment was able to load the airplane engines two abreast and carry as many as 55 of them in one shipment, while common carriers would be unable to move more than 4 or 5 engines in any one shipment, and Shutt could deliver 50 or more engines 500 miles away within 24 hours, whereas the same quantity and distance would require a common carrier a week or 10 days to complete the movement. (R. 88-90.)

Shutt's existing permits, either for himself or Oil Field Service, Inc., authorized him to use the specialized equipment over irregular routes, necessary to meet highway conditions of weak bridges, constricted underpasses, or congested traffic, a privilege of deviation denied to regular route common carriers. (R. 88.) These conditions were recognized by the Interstate Commerce Commission, which in due time specifically granted permits to Shutt (the movements here involved having already been substantially completed some time before) to carry airplane engines for the government on irregular routes, the specific finding of the Interstate Commerce Commission being "that there is immediate and urgent need for such service; that there is not available any carrier service capable of meeting such need." (R. 68-75.)

The only evidence of the government's right to recover was that there was a difference between the rates charged by Shutt and prevailing rates of other motor carriers which transported like goods from and to the same points (R. 49) but on cross-examination the government's only witness testified that the comparable tariffs which he used as "prevailing rates" were not tariffs applicable to special carriers authorized to carry such freight as contractors' supplies and oil field equipment; that he was not familiar with the specialized equipment required for such cargo (R. 66); that he had no knowledge of whether the service was on an emergency basis or involved overweight or oversized shipments beyond the legal limits; and that he had no knowledge of the exact service performed by any

carrier, either Shutt or the common carriers whose rates he was using for comparison (R. 76-77). He further testified that in arriving at his figures for which judgment was allowed, he had not taken into account any contract carrier rates or rates set up by any oil field carrier or carriers of contractors' equipment, and that he had not considered anything about specialized equipment or trucks or the emergency nature of the haul, but had only taken into consideration the rates set up for common carriers who would accept any kind of freight and send it out on a regularly scheduled truck movement in its due order (R. 80-81).

In addition to two orders of the Interstate Commerce Commission in the Spring of 1944, both expressly finding that there was not available any carrier service capable of meeting such need and authorizing Oil Field Service, Inc., to move airplane engines for the government over irregular routes between Dallas and all points in Texas, Oklahoma, Arkansas, and Louisiana (R. 68-75), Shutt himself testified that he operated specialized equipment to carry oversized and overweight oil field and contractors' machinery which was not customarily carried by common carriers (R. 88); that the movement of the airplane engines for the government was emergency service of a kind not furnished by the common carriers (R. 89-90); and that the saving of ten days to two weeks on large shipments at a distance was because he had equipment to give the kind of service that common carriers couldn't furnish (R. 90). He further testified that the basis of his charges to the

government was on the mileage basis shown on the tariffs then in effect for oil field and contractors' equipment, and subsequently ratified for airplane engines (R. 91-92).

6.

ARGUMENT

In order to bring suit for overcharges under *49 U. S. C., §16 (3)*, any shipper, including the government, "must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury," as this Court held in *Parsons v. Chicago & N. W. R. Co., 167 U. S. 447, 42 Law Ed. 231.*

The Eighth Circuit held that a mere violation by the carrier in making the charge was not sufficient, because there must be a showing of some specific pecuniary injury. *Knudsen-Ferguson Fruit Company v. Michigan Central R. Co., 148 Fed. 968, certiorari denied, 204 U. S. 671, 51 Law Ed. 672.*

The failure of Shutt to publish a rate, therefore, is insufficient to permit the government to recover, unless it shows some damage. Furthermore, if the rates charged would have been just and reasonable if published, there would have been no damage to the government as shipper, and it could not recover, as this Court said in *News Syndicate Company v. New York Central R. Co., 275 U. S. 179 at 187, 72 Law Ed. 225.*

The mere fact that the rate paid for expedited specialized service was higher than the rate for routine common

carrier service is not of itself proof of pecuniary damage. In *Davis v. Portland Seed Company, 264 U. S. 403, 68 Law Ed. 762*, where the shipper paid a higher short haul rate than the long haul rate, it was denied recovery of the difference because of lack of proof of pecuniary damage other than payment.

The situation here is akin to the mailing of a letter from one person to another. It can be mailed by regular routine mail under a three cent stamp, or, if the sender desires expedited specialized service, it can be sent air mail and special delivery, and the cost will be twenty-six cents. In each instance the *movement* is the same, that is, a letter is transported from point of origin to its destination, which is the basis for recovery which the government has used in the case of this movement of airplane engines. But when the sender desires expedited and specialized service, although the *movement* is the same, the *service* is different, and for the expedited and specialized service, the sender pays a higher rate than the routine rate for an air mail special delivery letter, and he also pays more for 55 engines delivered 500 miles away within 24 hours.

The government contends that the amount paid Shutt was in excess of the lowest net charges available to the government by other carriers. It bases those lowest net charges available entirely upon the non-comparable service furnished by common carriers, and the fact that it was not comparable was conclusively decided against the government by its own agency charged with the duty of making such determinations, when the Interstate Commerce Com-

mission found, by its orders entered in the record, that there was immediate and urgent need for the service of moving new and used airplane engines on government bill of lading over irregular routes, and that there was not available any carrier service capable of meeting such needs, the first such order being dated 4 March 1944 (R. 68).

Since there was not available any carrier service capable of meeting such need, the rates of common carriers unable to furnish such service are not comparable rates, and cannot be used as a basis of the contention that the government has paid more than the lowest net rates available, or has paid anything in excess of a reasonable charge for the services.

The rule laid down by the Interstate Commerce Commission and followed by the courts is that it is necessary to show pecuniary damage in that the rate paid was in excess of a reasonable charge for the services. One of the leading cases on the point is *Aron v. Pennsylvania R. Co., 80 Fed. 2d 100, by the Second Circuit, certiorari denied, 298 U. S. 658, 80 Law Ed. 1384.* As a prerequisite to recovery, it is necessary to prove how much of the payment was in excess of a reasonable charge. *Meeker v. Lehigh Valley R. Co., 236 U. S. 412 at 429, 50 Law Ed. 644 at 657; Pennsylvania R. Co. v. International Coal Mining Company, 230 U. S. 184, 57 Law Ed. 1446; Swift & Company v. United States, 343 U. S. 373 at 383, 96 Law Ed. 1008 at 1119.* The last case points out that unreasonableness is not proven by its mere assertion, and that the burden is upon the one claiming unreasonable charges, there being a pre-

sumption of good faith indulged regarding actions of carriers also. *Interstate Commerce Commission v. Chicago Great Western R. Co., 209 U. S. 108 at 119, 52 Law Ed. 705 at 713.*

One of the earliest cases passing upon the reasonableness of rates, and the factors which may be considered in the setting of them, is *Smyth v. Ames, 169 U. S. 527, 42 Law Ed. 819.* The Court there held, at page 540, that the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and that comparisons between the rates of two states are of little value unless all of the elements that enter into the problem are presented, and that a mere difference between the rates in two states is of comparatively little significance. The Court expressly rejected the theory that the State of Nebraska could require local freight business to be conducted at an actual loss if the overall operations gave a profit.

The applicability of that language to the instant case is obvious. Common carriers transport all kinds of freight in a general type of equipment and upon regular schedules, whereas a specialized carrier such as Shutt, having large equipment designed to handle outsize freight, on irregular shipments both as to schedule and routing, obviously has an entirely different set of cost factors as well as service factors. Oil Field Service, Inc., the corporation acquired by Shutt and in process of change-over, had tariffs on file approved by the Interstate Commerce Commission taking

such special factors into consideration and covering substantially all of the outsize freight that Shutt handled, the long detailed list of which is found at page 100 of the record. Included in the list are large pieces of oil field equipment and construction machinery and in connection with the latter and in the midst of a paragraph listing it, are steam or internal combustion engines. While the average individual would believe that an airplane engine came within the term "steam or internal combustion engines" and that it was not necessary to get specific permission for airplane engines new and used, yet an application was made for permission to carry airplane engines, which was subsequently granted by the appropriate regulatory body, the Interstate Commerce Commission, and the rates for the transportation of airplane engines, new and used, were fixed precisely at the same rates theretofore charged for the transportation of construction equipment, and steam or internal combustion engines. The Interstate Commerce Commission found that the rates for the transportation of airplane engines should come under the same tariffs theretofore in use for steam or internal combustion engines, and those tariffs contained the rates which Shutt had actually charged the government for his prior movements of the airplane engines, so that there is no showing that the rates charged by him were unreasonable, or were in excess of reasonable rates, but in fact it affirmatively appears that the rates charged by him were the same rates which the Interstate Commerce Commission theretofore had found to be reasonable for steam or internal combustion engines,

and thereafter found to be reasonable for airplane engines, new and used.

This Court has held that normally the Interstate Commerce Commission should determine the unreasonableness of the rate attacked, and that the Court will not do so, in *Lewis-Simas-Jones Co. v. Southern Pacific Company, 283 U. S. 654, 75 Law Ed. 1333.* Furthermore, when charges are not authorized by the tariffs, but are not unreasonable, they will not be the basis of recovery, according to the Interstate Commerce Commission. See *David Berg Industrial Alcohol Company v. Reading Company, 142 I. C. C. 161.*

Since the Interstate Commerce Commission has conclusively found that no other carrier was rendering this service, and by the subsequent approval of tariffs extending pre-existent approved rates to airplane engines, has found that the rates actually charged the government were reasonable, and since there has been no direct appeal from or attack upon those findings, we submit that the government is not entitled, 9 years later, to bring this action, and the trial court and Court of Appeals were both in error in that there is no evidence to sustain a finding that the government suffered pecuniary damage by paying any amount in excess of rates available to the government for the same service rendered by others.

Wherefore your petitioner prays that a writ of certiorari be granted, as provided in Rule 25, and that this cause be reviewed and determined by this Court as provided for by

the laws of the United States, and that the judgment herein of said Court of Appeals be reversed by this Court, and for such other relief as to this Court may seem proper.

Dated this 11th day of May, 1955.

WM. ANDRESS, JR.,
301 Blue Cross Building,
2208 Main Street,
Dallas, Texas,
Counsel for Petitioner.

APPENDIX

OPINION OF THE COURT OF APPEALS

(January 7, 1955.)

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and ALLRED, District Judge.

PER CURIAM: The suit was for the refund of $4,354.93 overpayments on the transportation of freight during the years 1943 and 1944.

The claim was: that the payments were made on the basis of payment vouchers signed by defendant reciting: "I certify * * * and that the rates charged are not in excess of the lowest net rate available for the government based on tariffs effective at the date of the service"; that to the extent of the overpayments this was not true; and that the plaintiff is therefore entitled to recover them.

The answer, while a little more detailed, consists in substance of a denial of plaintiff's claim and a plea of the statute of limitations.

Upon the issues thus joined, the cause was tried to the court without a jury, and there were findings of fact and conclusions of law: that the defendant had submitted vouchers, declaring that the charges made and received by him were not in excess of the lowest net tariffs available

for the government; that, on these vouchers, he had received sums in excess of the tariffs in the amounts sued for and thereby made himself liable for their return; that the statute of limitation had not barred their recovery; and that plaintiff should have judgment therefor.

Appealing from the judgment entered in accordance with these findings and conclusions, plaintiff is here insisting: (1) that the evidence does not support the finding that the rates were in excess of the lowest net tariff available; (2) that a prerequisite to a judgment is a finding by the Interstate Commerce Commission that the charges were unreasonable; (3) that the claim was barred by the statutory limitation of two years contained in Section 16, Par. 3 of the Act, 49 U. S. C. A. 16(3) (c); and (4) that it is reversible error to refuse a continuance.

We cannot agree with any of these contentions. Of the first two of these, it is sufficient to say that it is without basis in law or in fact. The action of the United States was based upon an agreement in effect providing that the charges to the government for the transportation of its property would not be in excess of the lowest net rate available to it, and upon the voucher certificates of the defendant that this was so as to each charge made and collected. The action of the United States in the nature of an action for money had and received was for the simple restitution of the overcharges induced by defendant's unfounded claim and certificate. *U. S. v. Borin, 209 F. 2d 145.*

For the same reason and upon the same authority, there is no merit in appellant's contention that the statutory limitation has barred the claim. Plaintiff did not invoke the statute, and, as sovereign, it is not subject in its general actions to the bar of limitation.

Finally, we think it clear that no showing is made of an abuse of discretion in the refusal of the continuance, that, indeed, its refusal was well within the court's discretion.

The judgment is AFFIRMED.